

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAYMOND REDDITT (Deceased))	
Claimant)	
VS.)	
)	Docket No. 211,963
McDONALD'S)	
Self-Insured Respondent)	

ORDER

Respondent requested review of the Award entered by Brad E. Avery, Assistant Director, on April 4, 1997. The Appeals Board heard oral arguments on October 1, 1997.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared on behalf of claimant. Brian J. Fowler of Kansas City, Missouri, appeared on behalf of respondent. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the Award and has adopted the stipulations listed in the Award.

ISSUES

Respondent asserts the Assistant Director erred in awarding death benefits to Madie Redditt, the claimant and deceased employee's surviving spouse. Specifically, respondent states that according to K.S.A. 1995 Supp. 44-508(c)(2), claimant is not eligible for and should not receive any benefits in this case because she willfully or voluntarily deserted or abandoned the deceased employee for more than six months prior to the date of the employee's death.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board concludes that the Award by the Assistant Director should be affirmed.

Raymond Redditt, deceased, was shot to death on November 16, 1995. The parties stipulated that his death arose out of and in the course of his employment with respondent, McDonald's Restaurant. The wife of the decedent and claimant in this action, Madie Redditt, is claiming death benefits pursuant to K.S.A. 44-510b.

Respondent, however, is contesting claimant's entitlement to death benefits. Respondent asserts claimant wilfully or voluntarily abandoned or deserted the deceased employee for more than six months prior to his death and is therefore precluded from receiving benefits under the provisions set forth in K.S.A. 44-508(c)(2).

Essentially, K.S.A. 1995 Supp. 44-508(c)(2) states, in pertinent part:

In the meaning of this section, a surviving spouse shall not be regarded as a dependent of a deceased employee or as a member of the family, if the surviving spouse shall have for more than six months wilfully or voluntarily deserted or abandoned the employee prior to the date of the employee's death.

The parties agree that other than a phone call from the decedent to claimant in 1986, the claimant and decedent had absolutely no direct contact with each other after 1978 or 1979 up and until the decedent's death in November of 1995. In addition, claimant did not receive any support be it financial or otherwise from the decedent from 1985 until his death in 1995. Furthermore, claimant applied for credit cards as a single person, listed herself on her children's school records as a single mother and filed her income tax returns as head of household. In light of the preceding information, respondent bases its main argument on the fact that claimant's lack of financial dependence on the decedent at the time of his death, along with the couple's lack of cohabitation or any type of normal marital relationship for well more than six months prior to the date of death, establishes either that claimant deserted or abandoned the decedent or that the couple simply mutually deserted the marital relationship. Either situation would preclude claimant from receiving benefits under K.S.A. 1995 Supp. 44-508(c)(2) according to respondent.

However, proof of dependency is not required of a surviving spouse on the deceased employee in Kansas. In Brinkmeyer v. City of Wichita, 223 Kan. 393, 573 P.2d 1044 (1978), the Court concluded that the 1974 amendments to K.S.A. 44-510b made no provisions for the payment of compensation to *partially* dependent spouses or children. By the changes in the statute's wording, the amendment would only provide for benefits to "surviving spouses" and "wholly dependent children." Therefore, the Court concluded "that by the 1974 amendments to K.S.A. 44-510b, the legislature intended not to deprive

a partially dependent surviving spouse of the benefits available under the . . . act. A surviving legal spouse is conclusively presumed to be wholly dependent upon the deceased workman, and is entitled to benefits provided by the act for a surviving legal spouse without proof of dependency.”

The Brinkmeyer Court also noted that portions of K.S.A. 1974 Supp. 44-510b would appear to conflict with portions of K.S.A. 1974 Supp. 44-508(c), which describes “dependents” under the Act as “members of the workman’s family who were wholly or in part dependent upon the workman at the time of the accident.” The Court stated it attempted to reconcile these two statutory provisions and in so doing, determined a “surviving legal spouse . . . is . . . eligible for benefits without proof of actual dependency.” Id. at 396 - 7. (Emphasis added).

Although Brinkmeyer interpreted the 1974 amendments to K.S.A. 44-510b, this interpretation should apply to the 1993 amendments to K.S.A. 44-510b as well, because the wording of the statute examined by Brinkmeyer that provides benefits to “surviving spouses” on the one hand and “wholly dependent children” on the other has not changed since 1974. Therefore, proving financial dependence or any other type of actual dependence or support of the surviving spouse on the deceased employee is not necessary for the surviving spouse to still be entitled to benefits under Kansas’ Workers Compensation Act.

With proof of dependency not being deemed necessary to award a surviving spouse benefits under the Act and with the marriage between claimant and the decedent being a valid marriage at the time of death, the Appeals Board must examine the record to determine if the evidence points to an actual abandonment of the marital relationship by claimant or a mutual abandonment of the marriage by both parties.

In Tisdale v. Wilson & Co., 141 Kan. 885, 43 P.2d 1064 (1935), the Court was faced with an issue similar to the case at hand. The Court was asked to determine whether the widow of a deceased workman had abandoned her husband, as intended by R.S. 1933 Supp. 44-508, and thereby excluded herself thereunder from receiving benefits. The Court determined the issue of whether an abandonment occurred is a question of law and looked to several different sources to define abandonment. For instance, in the case of Banta v. Banta, 112 Kan. 713, 212 Pac. 657 (1922), cessation from cohabitation was deemed necessary to show abandonment. In Bouvier’s Law Dictionary, 3d ed., abandonment was defined as “the act of a husband or wife who leaves his or her consort willfully, and with an intention of causing perpetual separation.” Tisdale at 890. Finally, the Court looked to 19 C.J. 56 which defined abandonment and/or desertion as “the voluntary separation of one spouse from the other for the prescribed time without the latter’s consent, without justification, and with the intention of not returning.” Id. at 890. (Emphasis added). In Tisdale, the Court focused on the intentions of the parties regarding the marital relationship. In so doing, the Court found the surviving spouse intended the separation to

be only temporary; therefore, she did not have the requisite intent to abandon the marriage.

In the case at hand, claimant left the marriage temporarily in 1972 when she lived with her mother. The couple did reunite after this brief separation and lived together as husband and wife in Memphis, Tennessee. However, in March of 1973, the couple again separated when the decedent began living with another woman. At that point, claimant moved in with her mother again and filed for a divorce. Claimant never followed through with divorce proceedings, however, and the couple remained legally married at the time of the decedent's death.

Later in 1973, claimant moved to Kansas City and the couple saw each other periodically from 1973 until 1979 but never reunited. In 1979 there was a possible attempt at reconciliation when claimant returned to Memphis, Tennessee, to see the decedent. However, neither claimant nor the decedent cohabited together nor does the record reflect any evidence that they both intended to or did resume their marital relationship. After this possible attempt at reconciliation, claimant returned to Kansas City to resume her employment. Such a departure by claimant to resume employment is a justifiable reason for living apart from a spouse without raising any inference of abandonment. See 99 C.J.S., *Workmen's Compensation*, § 140(3). Decedent remained in Memphis, Tennessee, until 1985 when he moved to Kansas City. Claimant returned to Memphis, Tennessee, to live in 1979. The couple had no contact with one another, except through the decedent's niece, from 1986 until the decedent's death in 1995.

Since the evidence fails to show a reconciliation of the marriage in 1979 or anytime thereafter, the Appeals Board must look back to the events of March of 1973. This was the last time the claimant and decedent lived together as husband and wife. At that time, the decedent was the first to leave the marital relationship to live with another woman. The evidence also shows the decedent was the first to exhibit a state of mind incompatible with a desire to continue the marital relationship. Because the decedent was the first to leave the marital relationship to live with another, claimant was not required to actively seek a reunion or reconciliation of the marriage to be eligible to receive benefits under the Act. See, e.g., 99 C.J.S., *Workmen's Compensation*, § 140(3); *Tatum v. Tatum*, 736 P.2d 506 (Okla. 1982). Additionally, despite respondent's arguments that claimant held herself out as a single person by, among other things, filing credit card applications as a single person, listing herself as a single mother on her children's school records and having extramarital affairs, the record clearly indicates claimant's intent that the marriage remain legally intact. The record further shows claimant's intent to remain legally married was in part due to claimant's religious and/or spiritual awakening late in 1983.

Furthermore, although claimant's own conduct between the 1973 separation and claimant's spiritual rebirth could not be classified as beyond reproach, claimant was justified in living apart from the decedent, as he was the first person to leave the marital relationship. Claimant, therefore, did not abandon or desert her spouse under the

provisions set forth in K.S.A. 1995 Supp. 44-508(c)(2). A valid marriage existed at the time of the decedent's death; thus, claimant is entitled to death benefits. Although such a result may not have been what the legislature intended when it enacted K.S.A. 44-508(c)(2), case law requires the result of an award of compensation.

In so finding the decedent was the abandoning party to the marriage, the Appeals Board need not reach the issue of whether a mutual abandonment of the marital relationship fulfills the requirements set forth in K.S.A. 1955 Supp. 44-508(c)(2).

AWARD

WHEREFORE, it is the decision of the Appeals Board that the Award of Assistant Director Brad E. Avery dated April 4, 1997, should be, and is hereby, affirmed.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Raymond Redditt, deceased, by and through his surviving spouse, Madie Redditt, and against the self-insured respondent, McDonald's, for an accidental injury sustained on November 16, 1995.

Subject to the restrictions, limitations and requirements of K.S.A. 44-510b, claimant is entitled to 843.21 weeks at \$237.19 per week for a maximum award of \$200,000 for a death benefit. As of November 4, 1997, there would be due and owing to the claimant 102.71 weeks in death benefit payments for a total due and owing of \$24,361.78 which is ordered paid in one lump sum. Thereafter, the remaining balance of \$175,638.22 shall be paid at \$237.19 per week for 740.50 weeks, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of November 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Appeals Board Member respectfully dissents from the opinion of the majority in the above matter. The majority has focused upon the events in March of 1973, in which the decedent was found to be the abandoning party of the marriage as defined by K.S.A. 1995 Supp. 44-508(c)(2) for leaving the marital relationship to live with another woman. Claimant, therefore, was awarded death benefits as the surviving spouse under K.S.A. 44-510b. While it is true that the decedent did leave the marriage in 1973, the majority has failed to recognize that more probable than not a reconciliation of the marriage occurred in 1978 and a mutual abandonment of the marital relationship occurred thereafter.

Claimant testified that in 1978, while she was visiting the decedent in Memphis, Tennessee, both she and the decedent suggested they reconcile their marriage. Claimant further testified that she wanted a reconciliation of the marriage at that point, and the decedent agreed to the reconciliation as well. The couple did engage in sexual relations at that time. Claimant and the decedent did not live together as husband and wife after this reconciliation, however, because claimant needed to return to Kansas City to resume her employment. Additionally, claimant admits to having sexual relations with two other men while living in Kansas City after this attempted reconciliation.

In 1979, claimant returned to live in Memphis, Tennessee. The couple did maintain somewhat regular contact with one another through 1985, when the decedent moved to Kansas City. However, except for a phone call from the decedent to claimant in 1986, the couple had absolutely no direct contact with each other from the time the decedent moved to Kansas City until the decedent's death in 1995. Furthermore, claimant, although claiming to have undergone a spiritual rebirth in 1983 which refurbished her intentions to remain married to the decedent, nevertheless, held herself out as a single person. She applied for credit cards as a single person, listed herself as a single mother on her children's school records and filed her income tax returns as head of household. Most importantly, the record contains no evidence that either claimant or the decedent made any attempts to carry on or sustain a normal marital relationship for the ten-year period from 1985, when the decedent moved to Kansas City, until his death in 1995.

This Appeals Board Member is not persuaded that the couple intended to remain married from 1985 until the decedent's death in 1995. Rather, the conduct and actions of the claimant and decedent demonstrate both an unwillingness to remain in the marriage and intentions contradictory to maintaining a normal marital relationship. As such, this Appeals Board Member would find that both the claimant and decedent mutually consented to the marital separation and breakdown after the 1978 attempted reconciliation. By mutually consenting to the separation of the marriage, the claimant and decedent each abandoned the marital relationship. Therefore, under the provisions set forth in K.S.A. 1995 Supp. 44-508(c)(2), claimant did, in fact, abandon and/or desert the decedent for well over six months prior to his death.

Furthermore, other jurisdictions which have addressed the issue of abandonment by a surviving spouse and whose respective Workers Compensation Acts contain statutory language similar to that of K.S.A. 1995 Supp. 44-508(c)(2) have reached the same conclusion that mutual consent toward marital separation and mutual abandonment of the marital relationship bar workers compensation recovery. See, e.g., City of Aurora v. Claimant in Death of Corr., 689 P.2d 659 (Colo. Ct.App. 1984); Bass v. Mooresville Mill, 11 N.C. App. 631, 182 S.E.2d 246 (1971), *cert. denied*, 281 N.C. 755, 191 S.E.2d 353 (1972).

Accordingly, recovery by claimant under Kansas' Workers Compensation Act should be barred by the provisions set forth in K.S.A. 44-508(c)(2), as claimant did in fact willfully or voluntarily abandon or desert the deceased employee for at least six months prior to the date of the deceased employee's death.

BOARD MEMBER

cc: James E. Martin, Overland Park, KS
Brian J. Fowler, Kansas City, MO
Brad E. Avery, Assistant Director
Philip S. Harness, Director